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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 739

COLGATE-PALMOLIVE COMPANY,
Petitioner,

against

THE HONORABLE FREDERICK v.P. BRYAN, Judge of the the United States for the Southern District of New York, and all other judges and officers of said court,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COLGATE-PALMOLIVE COMPANY,
Petitioner,
By EDMUND F. LAMB,
Attorney for Petitioner,
80 Broad Street,
New York 4, New York.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Colgate-Palmolive Company, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled proceeding.

The Opinions Below

The opinion of the Honorable Frederick v.P. Bryan, delivered in the District Court for the Southern District of New York is reported at 232 F. Supp. 577 and is con-

tained in the printed record of the Proceedings in the Court below at pages 14-21.

No opinion was delivered by the Court of Appeals.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed was dated and entered, October 5, 1964. There has been no rehearing or extension of time to petition for certiorari. Jurisdiction of this Court is invoked under 28 U.S.C.A. Secs. 1254(1) and 2101(c).

The Question Presented

The question presented is whether under the "interest of justice" proviso of 28 U.S.C.A. Sec. 1404(a), a plaintiff's choice of a forum, foreign to her citizenship, for the convenience of medical witnesses employed for her treatment, can outweigh the deprivation to a defendant of compulsory process over necessary witnesses on both the issues of liability and injury, available only within the District where the accident occurred, where plaintiff is a citizen, and where the action could originally have been brought.

The Statute Involved

The Statute involved is 28 U.S.C.A. Sec. 1404(a), reading as follows:

> "Sec. 1404(a) Change of Venue.
>
> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Statement of the Case

An action has been brought by Phyllis O. Mills, a citizen of Virginia, in the United States District Court for the Southern District of New York, to recover for personal injuries sustained by her as the result of a collision between an automobile which she was driving and one being driven by an employee of defendant, occurring within the geographical limits of the Eastern District of Virginia, Alexandria Division. In her complaint she demands damages of $2,000,000. The petitioner, the defendant in that action, moved in the District Court for removal of the action to the Eastern District of Virginia, Alexandria Division, for the convenience of witnesses and in the interest of justice. The District Court, by the Hon. Frederick v.P. Bryan, held that plaintiff's choice of forum and the convenience of physicians and nurses who treated her at Presbyterian Medical Center, New York, to which she was moved from Doctors Hospital, Washington, D. C., three weeks after the accident, outweighed the necessity for compulsory process on the part of the defendant to obtain the presence at trial of at least seven fact witnesses on the issue of liability and one medical witness, all of whom are within the subpoena power of the Alexandria Division of the Eastern District of Virginia, and none of whom are under the control of either plaintiff or defendant. The Court of Appeals for the Second Circuit has denied a petition for an order of mandamus to vacate the order denying transfer and to direct the entry of an order granting transfer as prayed for in the District Court.

Jurisdiction of the District Court for the Southern District of New York was based upon diversity of citizenship and amount in controversy.

Facts

On October 29, 1962, a collision occurred on Route 50 near Middleburg, Virginia, between an automobile being driven westerly by defendant's employee, Floyd, and an automobile being driven easterly by plaintiff. The plaintiff, who was 21 years of age at the time, resided in Middleburg, Virginia, with her parents, of which State she then was and still is a citizen. The defendant is a Delaware corporation authorized to do business in New York, and is also authorized to do business in Virginia (P.R., 14-16, 26).*

Following the accident, the plaintiff was removed by ambulance from the scene of the accident to Doctors Hospital in Washington, D. C., where she came under the care of Dr. Arthur Morris, who maintains his office at 915—19th Street, N. W., Washington, D. C., within subpoena distance of the U. S. District Court in Alexandria, Virginia (P.R., 7-8). A laminectomy had been performed by Dr. Morris (P.R., 6) and, according to the records of Doctors Hospital, the plaintiff following the operation was making an excellent recovery (P.R., 7). Contrary to his advice noted on the hospital record (P.R., 7), plaintiff on the advice of Dr. James Lawrence Pool of the Columbia Presbyterian Medical Center, New York, who examined plaintiff at Doctors Hospital at the instance of her parents, was removed by ambulance from Doctors Hospital to the Neurological Institute of Columbia Presbyterian Medical Center in New York (P.R., 15). Dr. Morris had advised against removal because, as noted in the records of Doctors Hospital, there was at that time "a complete lack of support at the level of the articular facets C6 and C7, that there was a lack of fusion and calcification" (P.R., 7).

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* References so indicated are to pages of the Printed Record of the Proceedings in the Court below.

Following plaintiff's removal to New York a second laminectomy was performed (P.R., 6) and plaintiff remained in the Presbyterian Medical Center under intensive treatment for seven months before she was discharged, still partly paralyzed and under the necessity of undergoing a course of physical therapy (P.R., 15-16).

The defendant has pleaded in its answer that plaintiff's injuries were aggravated and the damages resulting therefrom were enlarged by plaintiff's own conduct in acting contrary to competent and proper medical advice (P.R., 25). Dr. Morris has refused to come to New York to testify (P.R., 6-7).

The accident occurred on Route 50 on what is known locally as the "Dover Dips" (P.R., 10). Defendant's employee, proceeding westerly upgrade, was behind a highway truck approaching the crest of the first of these dips. He claims to have received a signal from the operator of the truck to pass the truck although a double line separated the two lanes of the highway. Proceeding out from behind the truck, he was suddenly met by plaintiff's car which had crossed the crest of the hill and was proceeding downgrade past the truck (P.R., 10-11). There were four Virginia State Highway employees in the truck (P.R., 20), three of whom were looking forward in the direction from which plaintiff was coming, the other one of whom was in the back of the truck looking behind in the direction from which defendant's employee was proceeding. All placed the accident (in statements given to plaintiff) behind the truck. (See their affidavits in the Papers in the District Court, submitted to the Court of Appeals in the Proceeding below.) Immediately following the accident, the scene of the accident was investigated by a State Highway Engineer, and a Virginia State Trooper, and plaintiff's car was removed from the accident scene by a local service station operator (P.R., 20). All of these witnesses reside within the geographical limits of the Alexandria Division of the Eastern District of Virginia

(P.R., 20). None of these witnesses is friendly to the defendant. They have refused to give statements to defendant's investigators (P.R. 20) and have testified against defendant's employee in a County Court in Loudon County, Virginia, where defendant's employee was tried on a reckless driving charge (P.R., 20).

Defendant has pleaded in its answer that plaintiff's injuries were due in whole or in part to her own fault, neglect, want of care and inattention, which would constitute, if established, a bar to her suit (P.R., 25). All of the seven aforementioned witnesses are necessary to the defendant on this issue, to establish the exact point of the collision in relation to the truck, the distance plaintiff traveled after passing the crest of the hill up to the point of collision, plaintiff's speed, the extent of visibility, the giving by the truck driver of any signal inviting passage of the truck, the road characteristics, and the length and direction of tire marks of either or both cars. Defendant's employee is also resident in the Alexandria Division of the Eastern District of Virginia. Investigations have been made and photographs of the accident scene taken on behalf of defendant by two other persons who are also resident within that District (P.R., 21).

Additionally, there are two fact witnesses cited by plaintiff who reside in West Virginia, who are not within subpoena power of either the Southern District of New York or the Eastern District of Virginia, who were driving in a car following plaintiff (P.R., 19-20).

As against the array of witnesses subject only to compulsory process within the Alexandria Division of the Eastern District of Virginia, plaintiff has cited as necessary witnesses five doctors of varying medical specialties who, together with Dr. James Lawrence Pool, the neurosurgeon who was her principal treating physician, cooperated in some phase of her medical treatment at the Columbia Presbyterian Medical Center (P.R., 18), all of whom have stated that it would be very difficult for them

to attend trial in Virginia but none of whom stated that he would refuse to do so, if necessary (P.R., 6). In addition, the plaintiff has named five nurses who attended her while an in-patient at Columbia Presbyterian Medical Center as being possible witnesses (P.R., 19). The treatment given plaintiff at New York is all the subject of extensive medical records and cannot possibly be open to dispute (P.R., 8). So far as the medical aspect of the case is concerned, the only dispute is whether the removal of plaintiff from Doctors Hospital aggravated her injuries as to which Dr. Morris and Dr. Pool are the only competent witnesses, except for possible undisclosed experts.

The papers also disclose that plaintiff was given physical therapy treatments at Middleburg, Virginia by Dr. Robert McConnell after discharge from Columbia Presbyterian Medical Center in July 1963 (see Ex. A, attached to affidavit of Dr. Pool in the Papers in the District Court), and was also examined from time to time by Dr. Robert A. Robinson of Johns Hopkins Hospital, Baltimore, also within subpoena distance of the United States District court in Alexandria, who in a report of the history given by plaintiff, indicates that she stated that the driver of the truck gave some type of passing signal, which she interpreted as intended for her (See the reply affidavit of Edmund F. Lamb in the Papers in the District Court). He also may become a necessary witness should there be a denial by the plaintiff of the history of the accident originally given by her as reported by him.

Reasons for Granting Writ

1. In denying defendant's motion to transfer this case to the United States District Court for the Eastern District of Virginia, Alexandria Division, Judge Bryan of the Southern District rested his decision upon the premises that plaintiff's choice of forum "will not be disturbed unless the balance of convenience and the interest of jus-

tice weighs heavily in favor of defendant", and that "It is the defendant's burden to overcome plaintiff's choice of forum and to demonstrate that the balance of convenience so preponderates in its favor" (P.R., 16-17). His conclusion in denying the motion was that: "Defendant has failed to show that the balance of convenience in the interest of justice weighs so heavily in its favor as to overcome the substantial weight to be given to plaintiff's choice of forum" (P.R., 21). This ruling of the District Court, which the Court of Appeals for the Second Circuit has refused to disturb on defendant's petition for mandamus, is in direct conflict with the principles applicable in applying sound judicial discretion on applications for transfer under 28 U.S.C.A. Sec. 1404(a), as enunciated by this Court in *Norwood* v. *Kirkpatrick,* 349 U. S. 29, and most recently in *Van Dusen* v. *Barrack,* 376 U. S. 612.

In *Norwood* v. *Kirkpatrick, supra,* this Court settled the conflicting views among the several Circuits as to the scope of discretion exercisable under Section 1404(a) in favor of a broader transfer than would be permissible under the *forum non conveniens* doctrine, saying (pp. 31-32):

> " 'It is perfectly clear that the purpose of this section of the Revised Judicial Code was to grant broadly the power of transfer for the convenience of parties and witnesses, in the interest of justice, whether dismissal under the doctrine of forum non conveniens would have been appropriate or not.' * * * As a consequence, we believe that Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader."

Under the *forum non conveniens* doctrine as established by this Court at the time Section 1404(a) was adopted, the plaintiff's choice of forum was given preponderant consideration, and it was held that: "But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed" (*Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501, 508). As pointed out in *Norwood,* the reason for this rule under the *forum non conveniens* doctrine was that the granting of the motion resulted in dismissal of the complaint and might result in a plaintiff being unable to successfully maintain an action because of the running of a statute of limitations in the forum deemed appropriate (349 U. S. at p. 31). It was specifically for the reason that Section 1404(a) avoided such a consequence, that it was held in *Norwood* that plaintiff's choice of forum was no longer to be treated as an overriding consideration (349 U. S. at p. 32). The rule of *Gulf Oil Corp.* above quoted, and upon which the District Court specifically almost verbatim relied, is therefore no longer applicable on motions to transfer under Section 1404(a).

That the rule of *Norwood* is still the rule of decision which should govern district courts is made eminently clear by the decision of this Court in March of this year in *Van Dusen* v. *Barrack,* 376 U. S. 612.

In that case the District Court for the Eastern District of Pennsylvania had granted motions for the transfer of actions pending in that court to the District of Massachusetts. The Circuit Court of Appeals for the Third Circuit in a mandamus proceeding had directed the vacation of the transfer order holding that the transfer could not be granted because at the time suit was brought, plaintiffs had not qualified to sue in Massachusetts. This Court granted certiorari.

The Circuit Court had reversed the District Court upon the ground that: "unless the plaintiff *had an unqualified*

right to bring suit in the transferee forum at the time he filed his original complaint, transfer to that district is not authorized by Sec. 1404(a)" (309 F. 2d at 957). The plaintiffs in that case were Pennsylvania fiduciaries representing the estates of Pennsylvania decedents and had not qualified under Massachusetts law to sue as representatives of the decedents in that State. This Court in reversing the Circuit Court and remanding to the District Court noted, citing *Norwood* v. *Kirkpatrick, supra,* that: "Section 1404(a) reflects an increased desire to have federal civil suits tried in the federal system at the place called for in the particular case by considerations of convenience and justice" (376 U. S. at p. 616), and held that the fact that plaintiffs had not qualified as personal representatives in Massachusetts did not preclude transfer to that Court despite their selection of a Pennsylvania District Court as the forum for the determination of their claims, saying (376 U. S. at pp. 623-624):

> "Finally, in construing 1404(a) we should consider whether a suggested interpretation would discriminatorily enable parties opposed to transfer, by means of their own acts or omissions, to prevent a transfer otherwise proper and warranted by convenience and justice.
>
> * * * * *
>
> "The possibilities thus suggested by the facts of the present case amply demonstrate that the limiting phrase of 1404(a) should be construed to prevent parties who are opposed to a change of venue from defeating a transfer which, but for their own deliberate acts or omissions, would be proper, convenient and just. The power to defeat a transfer to the convenient federal forum should derive from rights and privileges conferred by federal law and not from the deliberate conduct of a party favoring trial in an inconvenient forum."

In the cited case, referring to the decision in *Continental Grain Co.* v. *Barge FBL-585*, 364 U. S. 19, this Court quoted the language of Mr. Justice Black in that case (at p. 26) as follows:

> " 'The idea behind Sec. 1404(a) is that where a "civil action" to vindicate a wrong—however brought in a court—presents issues and requires witnesses that make one District Court more convenient than another, the trial judge can, after findings, transfer the whole action to the more convenient court.' " (376 U. S. at p. 622)

It would seem eminently clear, therefore, that this Court has clearly determined that the plaintiff's choice of forum is not entitled to any more weight than the other factors which should be considered in determining an application for transfer; that a defendant on such an application has no burden of overcoming plaintiff's choice; and that the principle upon which the District Court proceeded in denying transfer in the instant case is in conflict with the applicable principles established by this Court in applying sound, judicial discretion on such an application.

The applicable factors, apart from plaintiff's choice of forum, were set down by this Court in *Gulf Oil Corporation* v. *Gilbert*, 330 U. S. 501 at pages 508-509, as follows:

> "Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.
>
> • • • • •
>
> "Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested

> centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. * * * There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."

And at page 511:

> "Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants. Nor is it necessarily cured by the statement of plaintiff's counsel that he will see to getting many of the witnesses to the trial and that some of them 'would be delighted to come to New York to testify'."

In the instant case, the District Court not only gave no consideration to any of these factors, but moreover completely disregarded the final admonition in the above quoted statement of this Court (P.R., 20).

2. The affirmance by the Court of Appeals of the decision of the District Court denying removal is in substantial variance with the basic principles for the exercise of sound judicial discretion on such motions enunciated by the Courts of Appeals in the Fifth Circuit in *Koehring Co.* v. *Hyde Construction Co.*, 324 F. 2d 295, the Seventh Circuit in *Chicago, Rock Island & Pacific Railroad Co.* v. *Igoe*, 220 F. 2d 299, cert. den., 350 U. S. 822, the Fourth Circuit in *Southern Railway Company* v. *Madden*, 235 F. 2d 198, cert. den., 352 U. S. 953, and in the Sixth Circuit in *Lemon* v. *Druffel*, 253 F. 2d 680, cert. den. 358 U. S. 821.

In *Koehring Co.* v. *Hyde Construction Co., supra,* the Fifth Circuit adopted and applied the rule of the Seventh Circuit set forth in *Chicago, Rock Island & Pacific Railroad Co.* v. *Igoe, supra,* to the effect that the interest of justice provision of Section 1404(a) should be given paramount consideration, and that in weighing the interest of justice " 'there should be considered the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; the posibility of a view of the premises; and the state of the court calendar both in the District where the case is pending, and in the District to which it is sought to have the case transferred.' " (324 F. 2d 297).

In *Chicago, Rock Island & Pacific Railroad Co.* v. *Igoe, supra,* the Court of Appeals for the Seventh Circuit ordered the transfer of a cause from the Northern District of Illinois to the Southern District of Iowa involving an automobile collision which occurred in Iowa where the plaintiffs were resident at the time of the accident, although the plaintiffs had since moved to Illinois where the defendant's main office was shown to be, stating again the factors enumerated in *Gulf Oil* v. *Gilbert,* above quoted, and stressing that on a motion under Section 1404(a) the district court in its exercise of discretion must follow the statutory test of " 'convenience of parties and witnesses, in the interest of justice' " (220 F. 2d at p. 302). The Court further pointed out that the statutory test, "in the interest of justice" connotes conditions which are in furtherance of the administration of justice, and that this phrase "should be given paramount consideration." (*id.* p. 303).

In *Southern Railway Company* v. *Madden,* 235 F. 2d 198, the Court of Appeals for the Fourth Circuit on an appeal after the case was twice tried in the United States District Court of Columbia, South Carolina, reversed a judgment and directed a new trial and transferred the

case to the Western District of North Carolina at Charlotte, where the accident had occurred, saying (at p. 200):

> "On the question of transfer, it appeared not only that the plaintiff's injury occurred in Charlotte, North Carolina, and that the question of liability was governed by North Carolina law, but also that all of the witnesses to the occurrence and to the treatment of plaintiff in a Charlotte hospital following his injury lived in Charlotte, except one who had moved to West Virginia, and that a view of the locus in quo by the jury, which would be of importance in the trial of the case, could reasonably be had only if the case were tried in Charlotte. Furthermore, it appeared that the plaintiff was not a resident of Columbia, S. C., where the case was brought, or even in that judicial district, but of Anderson, S. C., a town in another judicial district and approximately as far from Columbia as from Charlotte, and that no one would be convenienced by a trial in Columbia except plaintiff's attorneys, a photographer who lived in Florence, S. C. and who had been employed to take photographs of the Charlotte railroad yard, and a surgeon and hospital attendants in a Florence hospital where plaintiff had been treated several months after his injury. The question of transfer under 28 U.S.C. Sec. 1404(a) was, of course, a matter resting in the sound discretion of the District Judge; but we cannot imagine a case more clearly calling for the exercise of the power of transfer conferred by the statute; and not to transfer it was, we think, not a sound exercise of discretion."

In *Lemon* v. *Druffel, supra,* the Court of Appeals for the Sixth Circuit on a petition for mandamus, in a case not unlike the case at bar, sustained an order transferring the case under Section 1404(a) from the District Court at Cincinnati, Ohio, to the District Court for the Eastern District of Kentucky at Catlettsburg. The accident hap-

pened approximately four miles from the locus of the District Court at Catlettsburg and the principal witnesses resided either within the geographical limits of that court or in nearby West Virginia. Plaintiff's opposition was based upon the convenience of medical witnesses who subsequently treated him and performed an operation upon him at Christ Hospital in Cincinnati.

The Court of Appeals for the Second Circuit in denying mandamus in the present case necessarily affirmed the principles upon which Judge Bryan proceeded in exercising discretion to deny transfer, and its decision thereby sets the rules of decision in the Second Circuit on a transfer application under 1404(a) at variance with the rules of decision enunciated by at least the Fifth, Seventh, Fourth and Sixth Circuits in the cases above referred to.

3. The denial by the Court of Appeals for the Second Circuit of an order of mandamus in this case has so far sanctioned such a departure by the United States District Court for the Southern District of New York from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

By the decision of the District Court denying defendant's motion to transfer, defendant has been placed in the position of being forced to try a matter of purely local concern to the Eastern District of Virginia in a metropolitan court foreign to the individuals involved in the accident out of which the injury arose, foreign to the locale of the accident, and without the benefit of compulsory process over even a single witness of any value to it in the defense of its case; it has been left wholly stripped of any power of defense except such as may be available through plaintiff's voluntary production of witnesses; it has in effect been prejudged on the issue of liability and left subjected to trial before a cosmopolitan jury, having no interest or concern with the litigation or the parties, upon the question of the quantum of damage.

CONCLUSION

In view of the considerations hereinabove set forth, petitioner respectfully submits that this petition should be granted and a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review the judgment entered by it in the above entitled proceeding.

COLGATE-PALMOLIVE COMPANY,
Petitioner,

By EDMUND F. LAMB,
Attorney for Petitioner,
80 Broad Street,
New York 4, New York.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

S. HAZARD GILLESPIE
Attorney for Respondents and Plaintiff Phyllis O. Mills
One Chase Manhattan Plaza
New York, New York 10005
HAnover 2-3400

J. ROGER CARROLL
T. RICHARD BROWN
Of Counsel

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Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

Counter Statement of Question Presented

Should this Court grant certiorari to review the Second Circuit's unanimous decision denying without opinion a writ of *mandamus* against a District Court Judge who has denied defendant's motion to transfer a personal injury action under 28 U.S.C. Section 1404(a) on the ground that the balance of convenience of parties and witnesses is tipped in favor of plaintiff's choice of forum?

Counter Statement of the Case

(a) The Basic Issue Presented

Plaintiff, Phyllis O. Mills, severely injured in an automobile accident in northern Virginia, brought suit in the Southern District of New York to recover damages because of the negligence of an employee of defendant, Colgate-

Palmolive Company (petitioner herein). Jurisdiction is based on diversity of citizenship.

Defendant-petitioner moved pursuant to 28 U.S.C. Section 1404(a) to transfer the case to the United States District Court for the Eastern District of Virginia. District Judge Bryan (respondent herein) denied the motion for the ultimate reason that "the balance [of convenience of parties and witnesses] seems to be tipped in plaintiff's favor". The Circuit Court (J. Edward Lumbard, Chief Judge, Leonard P. Moore and J. Joseph Smith, Circuit Judges), without opinion, denied defendant's petition for a writ of *mandamus*. Defendant now seeks a writ of certiorari from that denial for a writ of *mandamus*.

There is no question of law for determination by this Court.

The decision of Judge Bryan is reported in 232 F. Supp. 577 (S.D.N.Y. 1964). A copy is appendix A hereto.

(b) The Facts

Plaintiff is a citizen of Virginia and a temporary resident of the State of New York. Defendant-petitioner, Colgate-Palmolive Company, is a Delaware corporation having its principal place of business at 300 Park Avenue, New York City.

The accident out of which this suit grows occurred on October 29, 1962. After three weeks' treatment at Doctors Hospital in Washington, D. C., plaintiff who was then totally paralyzed, was removed by ambulance to Columbia Presbyterian Hospital in New York City to which she was confined for seven months and where she has been treated for the last two years. This suit was not commenced in

the Southern District of New York until over a year after this treatment was begun. (16*).

It was established to the satisfaction of Judge Bryan that the following persons, treating surgeons and doctors, (all of whom submitted affidavits in opposition to petitioner's motion to transfer) were necessary witnesses and that their live testimony was "of vital importance" to plaintiff's cause of action (19).

Dr. James Lawrence Pool

Dr. Stanley B. Braham

Dr. Frank E. Stinchfield

Dr. John H. Laragh

Dr. John A. Downey

Dr. Hans J. Heller

In addition to the evidence supplied by these medical witnesses, that of the surgeon who has performed and will be performing a series of operations on Miss Mills' hands (the most recent of which was performed as lately as December 21, 1964) will be required, as well as five nurses who attended her at Columbia Presbyterian Hospital. All of these people reside in the New York area, near Columbia Presbyterian, and it was also established to Judge Bryan's satisfaction, at least, that these medical witnesses would not be available for and would not attend a trial in Virginia. (19).

In order to continue rehabilitation, Miss Mills, after leaving the hospital, took up residence in the city of New

* Page references to Judge Bryan's opinion are those in appendix A.

York, renting an apartment where she will live until further surgery and treatment are of no avail, when she will return to her home in Middleburg, Virginia. (15).

The question of liability is subordinate to the proof of the physical injuries. Petitioner in response to a request to admit has acknowledged that the accident in suit occurred when its employee pulled out from behind a moving truck, partly crossed an unbroken double line to the wrong side of the road and crashed into the vehicle driven by Miss Mills, which was coming from the opposite direction. Petitioner has also admitted that its employee was thereafter convicted of reckless driving.

Petitioner-defendant's assertion (Pet. 5, 6), that there are many fact witnesses whose testimony may not be available unless the case is tried in Virginia, is misleading. Not one of these witnesses was called by defendant's employee when he was tried and convicted on the reckless driving charge. These witnesses are favorable to plaintiff and have indicated by affidavit on this motion that they will come to New York to testify. (21). No proof has been submitted by defendant that anyone of these fact witnesses would be of value to it. The only two affidavits in support of the motion to transfer were made by petitioner's attorney. The medical witness, Dr. Arthur Morris, treated plaintiff in the hospital in Washington, D. C. His testimony is available by deposition. (21).

There is no support for the contention that a denial of the application to transfer was an abuse of discretion.

POINT I

The law has been settled by this Court.

This Court has held repeatedly that the determination of the propriety of a transfer is within the discretion of the district court judge. Yet, in an effort to avoid the weight of this principle, petitioner (Pet. 7, 8) takes issue with three statements in the opinion of Judge Bryan, to wit:

> (1) "In determining such a motion a plaintiff's choice of forum must be given substantial weight and will not be disturbed unless the balance of convenience and the interest of justice weighs heavily in favor of defendant." (16);
>
> (2) "It is the defendant's burden to overcome plaintiff's choice of forum and to demonstrate that the balance of convenience so preponderates in its favor." (16);
>
> (3) "Defendant has failed to show that the balance of convenience in the interest of justice weighs so heavily in its favor as to overcome the substantial weight to be given to plaintiff's choice of forum." (22).

Petitioner contends that these statements are "in direct conflict with the principles applicable in applying sound judicial discretion on applications for transfer * * * as enunciated by this Court in *Norwood* v. *Kirkpatrick*, 349 U.S. 29 [1955], and most recently in *Van Dusen* v. *Barrack*, 376 U.S. 612 [1964]." (Pet. 8).

Before discussing petitioner's erroneous interpretation of the *Norwood* and *Van Dusen* cases, it should be made

clear that Judge Bryan, in ruling against transfer, did not rest his decision solely on the statements excerpted from his opinion by petitioner and set forth just above. Indeed, in the last quotation, commencing "Defendant has failed to show [etc.] * * * ", petitioner has omitted the all-important closing sentence of Judge Bryan:

> "Indeed, if anything, the balance [of convenience] seems to be tipped in plaintiff's favor." (22).

In other words, while Judge Bryan did state that the burden was upon the defendant to overcome plaintiff's choice of forum, he concluded that in any event the balance of convenience was in plaintiff's favor.

So far as the cases advanced by petitioner are concerned, counsel for petitioner argues, as it did unsuccessfully below, that the *Norwood* case stands for the proposition that a plaintiff's choice of forum is entitled to little weight and that a defendant moving for a transfer "has no burden of overcoming plaintiff's choice". (Pet. 11).

Plaintiff Mills in her memoranda below agreed that transfer is a matter for the discretion of the district court and that this discretion is broader under Section 1404(a) than under the doctrine of *forum non conveniens* which gave almost conclusive weight to a plaintiff's choice of forum because that doctrine would otherwise permit dismissal of the complaint to the certain detriment of the plaintiff. See *All States Freight* v. *Modarelli*, 196 F. 2d 1010, 1011 (3d Cir. 1952). But petitioner's argument that the plaintiff's choice of forum is entitled to virtually no weight on a motion to transfer cannot be sustained and is contradicted by the very language petitioner quotes from *Norwood* v. *Kirkpatrick* (Pet. 8):

> "* * * [W]e believe that Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit Courts to grant transfers upon a lesser showing of inconvenience. *This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered,* but only that the discretion to be exercised is broader." 349 U.S. at 32 (Emphasis supplied).

Neither does the decision of this Court in *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964) support petitioner's plea for a writ of certiorari. There the sole issue was whether the underlying suits might have been brought in the transferee district, and this Court held that a voluntary declination by the plaintiffs to qualify as ancillary administrators in the state of the transferee district did not keep that district from being one "where it [the suit] might have been brought" (28 U.S.C. 1404(a)). This question is in no way involved in the instant case. It was conceded at the opening of the argument before Judge Bryan, as it still is, that this suit "might have been brought" in the transferee district. Instead it was brought in the Southern District of New York, and that court has exercised its discretion "for the convenience of parties and witnesses, in the interest of justice" to retain it there. The law applied by Judge Bryan is well settled and certainly requires no further enunciation by this Court.

POINT II

There is no conflict between the circuits requiring reconciliation by this Court.

Petitioner attempts to fabricate a circuit conflict. Inasmuch as the Second Circuit wrote no opinion in denying the petition for mandamus, it is impossible to know the bases for its refusal to examine the discretionary decision of Judge Bryan. Nonetheless, petitioner argues:

> "The affirmance by the [Second Circuit] Court of Appeals of the decision * * * denying removal is in substantial variance with the basic principles for the exercise of sound judicial discretion on such motions enunciated by the Courts of Appeals in the Fifth Circuit in *Koehring Co.* v. *Hyde Construction Co.*, 324 F. 2d 295 [1963], the Seventh Circuit in *Chicago, Rock Island & Pacific Railroad Co.* v. *Igoe*, 220 F. 2d 299 [1955], *cert. den.*, 350 U.S. 822 [1955], the Fourth Circuit in *Southern Railway Company* v. *Madden*, 235 F. 2d 198 [1956], *cert. den.*, 352 U.S. 953 [1956], and in the Sixth Circuit in *Lemon* v. *Druffel*, 253 F. 2d 680 [1958], *cert. den.*, 358 U.S. 821 [1958]." (Pet. 12).

An analysis of the foregoing decisions belies any conflict and in fact affirms the common denominator that each transfer motion is a discretionary matter and must be decided on its own facts. See *United Air Lines* v. *United States*, 192 F. Supp. 795, 796 (D. Del. 1959); 1 Moore, *Federal Practice* ¶ 0.145 [5] at pp. 1779-80 (2d ed. 1961).

The *Koehring* case involved no question of a writ of *mandamus*. Defendant appealed to the Fifth Circuit from

the denial of motions to dismiss for want of jurisdiction and to transfer. The circuit court did not pass on the jurisdictional issue but ordered a transfer. The action was not one based on personal injuries but was grounded on an alleged breach of contract in defendant's failure to construct a cooling and mixing plant. In directing transfer, the Fifth Circuit observed:

> "* * * [A]ll relevant facts concerning its [defendant's] alleged failure to perform occurred in Oklahoma [the transferee district] * * *. Most of the witnesses to the alleged failure of performance reside at or near the plant site, and the records of the U.S. Corps of Engineers dealing with the functioning of the plant are kept in Tulsa." 324 F. 2d at 296.

In the *Igoe* case, the Seventh Circuit did issue a writ of *mandamus* to order a transfer but the facts therein were entirely dissimilar. Plaintiff there was a citizen *and resident* of the transferee district at the time she commenced suit for her husband's wrongful death; all witnesses were resident in the transferee district. Inasmuch as plaintiff was acting in a representative capacity, appointed by a state court in the transferee state, authorization of that court would be required to effect any settlement. The only argument advanced against transfer was that plaintiff had moved to the transferor forum as a result of her remarriage some nine months after commencement of her suit there.

The *Southern Railway* case did not concern a petition for writ of *mandamus* but dealt with an appeal after judgment where damages had been awarded in a personal injury action by a plaintiff injured in Charlotte, North

Carolina. One of the issues raised on appeal was "whether there was an abuse of discretion in not transferring the case [from the Eastern District of South Carolina at Columbia] to Charlotte, North Carolina". The Fourth Circuit directed transfer upon concluding that most witnesses on issues of both liability and damage would have found the transferee forum to be more convenient. Further, it appeared that the plaintiff was not a resident in the judicial district where the case was brought but lived in a town approximately as far from Columbia as from Charlotte.

In the final decision relied on by petitioner, that of *Lemon* v. *Druffel,* the writ of *mandamus* was denied as in the case at bar. There, plaintiff had filed an FELA action against the defendant railroad in a Kentucky district court but then obtained a dismissal and filed his action in the District Court for the Southern District of Ohio. Thereafter, the defendant's motion to transfer the action back to Kentucky was granted. Although plaintiff was an Ohio resident he lived only some eight miles from the Kentucky court and approximately 140 miles from the Ohio court. All the material and necessary witnesses, including a number of doctors who attended plaintiff, resided in Ohio. The Sixth Circuit declined to grant *mandamus*—the reasoning of that Court is in apparent accord with the refusal of the Second Circuit to grant *mandamus* herein.

> "In this case, as in most cases of this kind, there are factors favorable to both the District Court in Kentucky and the District Court in Ohio, requiring a balancing of conveniences by the District Judge. * * * We do not find present in this case the exceptional circumstances where there is a clear abuse of

> discretion such as to justify the use of the writ." 253 F. 2d at 685.

Clearly, a compelling case of abuse of discretion by a district court must be made out before the harsh and extraordinary remedy of *mandamus* is appropriate. See *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953). ("The supplementary review power conferred on the courts * * * in the All Writs Act [28 U.S.C. § 1651(a)] is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' * * *.") This is particularly true in such a case as this where petitioner has succeeded in effectually obtaining the interlocutory appeal which is not sanctioned by law and thereby delayed the progress of this action for some six months. In the interest of centering and concluding transfer motions in the district courts, the decision of the Second Circuit evidencing close circumscription of efforts to overturn transfer motion orders is the only sound judicial course.

CONCLUSION

Petitioner has failed to show that Judge Bryan abused his discretion in denying a transfer, that the Second Circuit erred in refusing to grant the drastic remedy of *mandamus*, or that a grant of certiorari is warranted under any of the standards established by this Court.

The petition should be denied.

Dated: December 28, 1964.

Respectfully submitted,

S. HAZARD GILLESPIE
Attorney for Respondents and Plaintiff Phyllis O. Mills

J. ROGER CARROLL
T. RICHARD BROWN
Of Counsel

APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 Civ. 3597

PHYLLIS O. MILLS,

Plaintiff,

—against—

COLGATE-PALMOLIVE COMPANY,

Defendant.

Appearances:

DAVIS, POLK, WARDWELL, SUNDERLAND, & KIENDL, Esqs.
New York City
Attorneys for Plaintiff
S. HAZARD GILLESPIE, Esq.
J. ROGER CARROLL, Esq.
T. RICHARD BROWN, Esq.
Of Counsel.

PURDY, LAMB & CATOGGIO, Esqs.
New York City
Attorneys for Defendant
EDMUND F. LAMB, Esq.
WILLIAM E. FAY, III, Esq.
Of Counsel.

Appendix A—Opinion of Bryan, D.J.

OPINION

BRYAN, District Judge:

Defendant moves under 28 U.S.C. § 1404(a) to transfer this diversity action for personal injuries to the Eastern District of Virginia, Alexandria Division, "for the convenience of parties and witnesses, in the interest of justice."

At the time of the accident in which the injuries sued for occurred plaintiff Phyllis O. Mills was a citizen of Virginia and was domiciled with her parents in Middleburg, Virginia. She is still a citizen of that State. Defendant Colgate-Palmolive Company is a Delaware corporation authorized to do business in New York, and has its principal place of business here. It is also authorized to do business in Virginia.

The accident occurred on October 29, 1962 when a car driven by defendant's employee Floyd collided with the car which plaintiff was driving on Route 50 near Middleburg. Apparently Floyd was attempting to pass a truck proceeding in the same direction ahead of him. In so doing he swung out from behind the truck, crossed partially over an unbroken double line in the center of the highway and collided head on with the plaintiff who was driving her car in the opposite direction. Defendant admits that Floyd was on the defendant's business and acting within the scope of his employment. Floyd was thereafter convicted of reckless driving in the County Court of Loudon County, Virginia, on charges based on the accident.

Plaintiff, who was 21 at the time of the accident, was

extremely seriously injured and she is suing for two million dollars damages. She was taken by ambulance to Doctors Hospital in Washington, D. C. and was found to be almost completely paralyzed. For some time she was not only paraplegic but virtually quadraplegic. Her parents arranged for Dr. James Lawrence Pool, Chairman of the Department of Neurology at Columbia Presbyterian Medical Center, and a leading Neuro-Surgeon, to see her in Washington. After three weeks in the Washington hospital, upon Dr. Pool's advice she was removed by ambulance to the Neurological Institute at Columbia Presbyterian Medical Center in New York. She was a patient there for seven months and was under the care and treatment of several distinguished specialists in various fields. Two operations on the cervical spinal cord were performed and extensive traction and body rotation procedures were employed in an effort to restore the motor function in her arms, hands and legs.

After her discharge from the Neurological Institute, plaintiff still had a long way to go. In September, 1963, on the advice of her physicians, she commenced a concentrated course of physical therapy at the Rehabilitation Center of the Neurological Institute. She took a two and one-half year lease on a small apartment in New York to enable her to pursue her physical therapy treatments until further progress is no longer possible. Thus, while she remains a citizen of Virginia, she is temporarily a resident of this district. It is not presently possible to forecast how long her course of physical therapy treatments will take and her eventual full recovery is at best very doubtful.

Appendix A—Opinion of Bryan, D.J.

On December 24, 1963, more than a year after the accident occurred and some time after she had made arrangements to reside here temporarily she commenced this action. Defendant interposed an answer denying liability and pleading contributory negligence and aggravation of plaintiff's injuries through her own fault. The present motion to transfer followed.

The general principles governing motions for transfer under § 1404(a) are by now so well settled and have been discussed at length so frequently that it would serve no good purpose to repeat them here. See, e.g., Norwood v. Kirkpatrick, 349 U.S. 29 (1955); Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); Lykes Brothers S.S. Co. v. Sugarman, 272 F. 2d 679 (2 Cir. 1959); Schindelheim v. Braniff Airways, Inc., 202 F. Supp. 313 (S.D.N.Y. 1962); Rodgers v. Northwest Airlines, Inc., 202 F. Supp. 309 (S.D.N.Y. 1962); DeSousa v. Panama Canal Co., 202 F. Supp. 22, 26 (S.D.N.Y. 1962).[1] In determining such a motion a plaintiff's choice of forum must be given substantial weight and will not be disturbed unless the balance of convenience and the interest of justice weighs heavily in favor of defendant. It is the defendant's burden to overcome plaintiff's choice of forum and to demonstrate that the balance of convenience so preponderates in its favor.

Apart from applicable general principles, however, the numerous cases are not particularly helpful. Each case must be decided on its own particular facts. Thus such

[1] Here the suit might have been brought in the Virginia District and the rule of Hoffman v. Bleski, 363 U.S. 335 (1960) is satisfied.

cases as Tyrill v. Alcoa Steamship Company, Inc., 158 F. Supp. 853 (S.D.N.Y. 1958) and Markantonatos v. Maryland Drydock Co., 110 F. Supp. 862 (S.D.N.Y. 1953), relied on by plaintiff are not controlling.

In this case defendant contends that the action has no logical connection with New York and was brought in this district by the plaintiff for the purpose of securing an enhanced award of damages from a metropolitan jury. It urges that for these reasons plaintiff's choice of forum should be given less weight than would ordinarily be the case. It asserts that the principal issue in the case is that of liability and that trial should be held in the Virginia district where the accident occurred, where the majority of witnesses on that issue reside and where the court would be thoroughly conversant with the applicable Virginia law. It claims that it will be prejudiced if the case is not transferred there.

Defendant [plaintiff], on the other hand, urges that in view of the facts as they appear the question of the amount of her damages rather than that of the liability is the principal issue in the case, that on that issue the relevant events took place in New York and almost all of the witnesses on that issue are distinguished New York professional men who actually treated her and who would find it difficult, if not impossible, to attend a trial in Virginia. It is her position that a transfer to that district would be to her substantial prejudice. She says that the action has a logical connection with this district and should be tried here and that her choice of forum was dictated by these considerations and by the fact that her temporary but indefinite residence in New York was essential for her

rehabilitation from the effects of the accident and not by any desire to secure an enhanced verdict as defendant claims.

I am not impressed by defendant's suggestion that the action was brought in this district because the plaintiff was forum shopping and that her choice of forum should be given little weight for that reason. Plaintiff was brought to New York by her parents when her condition was extremely serious solely so that she could get the best treatment obtainable and be able to take advantage of every possibility of ultimate salvage. The top flight professional men at the Columbia Presbyterian Medical Center in the several relevant fields made this the logical and sensible decision under the circumstances. These men included in addition to Dr. Pool, Dr. Frank Stinchfield, the renowned orthopedic surgeon and Chairman of the Department of Orthopedic Surgery, and four other highly qualified members of the Columbia Presbyterian staff specializing respectively in urology, clinical medicine, physical medicine and rehabilitation and physical therapy. The efforts of this team of doctors have proved at least partially successful. Plaintiff herself has made every effort to push forward on the essential program of physical therapy prescribed for her attempted rehabilitation. The temporary residence which she now maintains and must indefinitely maintain here is necessary for that purpose. Incidentally, any success which she may have in her efforts at rehabilitation cannot fail to redound to the benefit of defendant.

Though plaintiff remains a citizen of Virginia and hopes to return there, she is very properly residing in New

York for these very purposes. As to one of the two major issues, that of the nature, extent and permanence of the injuries, the suit has a real and actual connection with this district. Plaintiff was not only entitled to bring suit here but from her point of view this district was the logical and proper forum for this litigation. Her choice of forum is to be given full weight in determining transfer.

Moreover, under the circumstances here it might well be prejudicial to her were the case to be tried in Virginia. On the major issue of the nature, extent and permanence of her injuries the live testimony of the physicians who treated her is of vital importance to her case. Depositions would not be a satisfactory substitute. Each of these physicians has a different specialty. In a case where the injuries are as serious as this it cannot be said, as the defendant contends, that their testimony would be merely cumulative. It is quite understandable that it would be not only highly inconvenient but virtually impossible for these leading and busy physicians engaged both in active practice and in hospital and teaching responsibilities, to attend a trial in Virginia as their affidavits submitted on this motion clearly indicate. In addition, the testimony of at least some of the five nurses who cared for plaintiff, all of whom reside here, will be necessary to her case. Such testimony cannot be brushed off with the claim that the hospital records are all she needs. This is an entirely unrealistic concept of what constitutes proof of injuries and damages in a case such as this. Indeed, it is the plaintiff and not the defendant who is entitled to determine the quality and extent of proof which is necessary to support her claims.

Moreover, assuming that the issue of liability is of equal importance with the issue of damages (and this question is surely not free from doubt under the circumstances disclosed here) defendant has not shown it will be substantially prejudiced on this issue were the case to be tried in this district. Apart from plaintiff and defendant's employee Floyd, there are nine persons who will be witnesses on the question of liability. Two of these are West Virginia residents who were driving behind plaintiff's car when the accident occurred. For all practical purposes they could be as easily produced here as in Virginia. The seven others are all residents of Virginia. Four of them, the driver of the Virginia Highway Department truck which Floyd was attempting to pass when the accident occurred, and three other Virginia Highway employees who were in the truck at the time, may be considered as eye witnesses of the accident. There is also a State engineer who came upon the scene shortly after the accident, a Virginia State Trooper who was called to the scene, and the local service station operator who came to the accident in his wrecker.

While the defendant claims that these witnesses are "unfriendly" because it has been unable to obtain statements from them, and says it does not know what they will testify to, the fact is that all seven testified in the criminal proceedings in which Floyd was convicted of reckless driving. Doubtless the defendant can obtain the testimony they gave there.

However, all of these nine are witnesses for the plaintiff who has the burden of establishing liability in any event. The plaintiff has not only stated her intention of

producing these witnesses at the trial but has annexed to her papers in opposition affidavits of each of them, including the two West Virginia residents, stating that they would be willing to come to New York for a trial. Initially plaintiff will bear the expense of bringing them here. Upon their own representations that they are willing to appear and the plaintiff's representations that she will bring them here, there is every reason to suppose that they will be present at a trial here. They will thus be available to the defendant for cross-examination and the defendant will also be able to call them in its own case in the unlikely event that it should deem this to be desirable.

Defendant also lays stress on the testimony of Dr. Morris who treated plaintiff during her stay in Doctors Hospital in Washington, and who may not be available to testify here. But Dr. Morris is a witness for the plaintiff and plaintiff is quite content to take his testimony by deposition. Defendant will have ample opportunity to cross-examine him when his deposition is taken on its claim that the movement of plaintiff to New York aggravated her condition, if that claim has any substance. Floyd is the defendant's own employee. There should be no difficulty in having him and defendant's own investigator and photographer here for the trial.

I see no major obstacles to a fair, just and easy trial of the action in this district. There is no magic in having a Virginia jury pass on the questions in this case merely because the accident occurred in that state. Nor should there be any difficulty in having Virginia negligence law applied by the judge sitting in this district as defendant seems to think. They constantly handle similar problems.

Defendant has failed to show that the balance of convenience in the interest of justice weighs so heavily in its favor as to overcome the substantial weight to be given to plaintiff's choice of forum. Indeed, if anything, the balance seems to be tipped in plaintiff's favor.

The motion for transfer is denied.

It is so ordered.

Dated: New York, N. Y.
July 23, 1964

FREDERICK vP. BRYAN
U.S.D.J.